

FINANCIAL INSTITUTIONS REFORM, RECOVERY AND ENFORCEMENT ACT OF 1989

R E P O R T

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

together with

SUPPLEMENTAL AND ADDITIONAL VIEWS



JUNE 1, 1989.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1989

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ENFORCEMENT ACT OF 1989

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Mr. BROOKS, from the Committee on the Judiciary,
submitted the following

REPORT

together with

SUPPLEMENTAL AND ADDITIONAL VIEWS

[To accompany H.R. 1278]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1278) to reform, recapitalize, and consolidate the Federal deposit insurance system, to enhance the regulatory and enforcement powers of Federal financial institutions regulatory agencies, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments (stated in terms of the page and line numbers of the bill as reported by the Committee on Banking, Finance and Urban Affairs) are as follows:

Page 642, line 11, strike "PENALTY.—" and all that follows through line 18 and insert in lieu thereof

"PENALTY.—

"(1) GENERALLY.—The amount of civil penalty under this section shall not exceed twice the amount of actual loss to the Government. Actual loss to the Government includes costs of experts, attorneys' fees, administrative overhead, salaries of employees, and other costs in regulating, investigating, and prosecuting civil and criminal cases with respect to the conduct that is the basis of the claim for a civil penalty under this section. Actual loss to the Government also includes all monies paid out of any Federal deposit in-

insurance fund and any other costs incurred by the Government as a result of such conduct.”.

Page 642, line 19, strike “(3)” and insert “(2)”.

Page 642, line 23, strike “amounts” and insert “amount”.

Page 642, line 24, strike “paragraphs (1) and (2)” and insert “paragraph (1)”.

Page 643, line 14, strike “clear and convincing” and insert “the preponderance of the”.

Page 653, line 20, strike “5 years, or both.” and insert “1 year, or both, or, if the offense was committed with the intent to obstruct the enforcement of the subpoena or to obstruct any other proceeding, shall be fined under this title or imprisoned not more than 5 years, or both.”.

Page 655, strike out line 9 and all that follows through page 658, line 19, and insert in lieu thereof the following:

SEC. 963. CIVIL AND CRIMINAL FORFEITURE.

(a) CIVIL FORFEITURE.—Section 981(a)(1) of title 18, United States Code, is amended by adding at the end the following:

“(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 657, 1005, 1006, 1007, 1014, or 1344 of this title.”.

(b) TRANSFER OF PROPERTY UNDER CIVIL FORFEITURE.—Section 981(e) of title 18, United States Code, is amended—

(1) in the matter before paragraph (1), by striking out “determine to—” and inserting in lieu thereof “determine—”;

(2) by striking out paragraphs (1) and (2) and inserting in lieu thereof the following:

“(1) to any other Federal agency;

“(2) to any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property;

“(3) in the case of property referred to in subsection (a)(1)(C) (if the affected financial institution is in receivership or liquidation), to any Federal financial institution regulatory agency—

“(A) to reimburse the agency for payments to claimants or creditors of the institution; and

“(B) to reimburse the insurance fund of the agency for losses suffered by the fund as a result of the receivership or liquidation;

“(4) in the case of property referred to in subsection (a)(1)(C) (if the affected financial institution is not in receivership or liquidation), upon the order of the appropriate Federal financial institution regulatory agency, to the financial institution as restitution, with the value of the property so transferred to be set off against any amount later recovered by the financial institution as compensatory damages in any State or Federal proceeding; or

"(5) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency, to the extent of the agency's contribution of resources to, or expenses involved in, the seizure and forfeiture, and the investigation leading directly to the seizure and forfeiture, of such property."; and

(3) by adding at the end the following new sentence: "The United States shall not be liable in any action arising out of a transfer under paragraph (3), (4), or (5) of this subsection."

(c) CRIMINAL FORFEITURE.—Section 982 of title 18, United States Code, is amended—

(1) in subsection (a)—

(A) by inserting "(1)" after "(a)"; and

(B) by adding at the end the following:

"(2) The court, in imposing sentence on a person convicted of an offense under section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title, or a conspiracy to commit such an offense, affecting a financial institution, shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation."; and

(2) in subsection (b), by striking "(b) The provisions" and all that follows through "However, the" and inserting in lieu thereof the following:

"(b)(1) Property subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed—

"(A) in the case of a forfeiture under subsection (a)(1) of this section, by subsections (c) and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853); and

"(B) in the case of a forfeiture under subsection (a)(2) of this section, by subsections (b), (c), (e), and (g) through (p) of section 413 of such Act.

"(2) The".

Page 661, strike line 1 and all that follows through line 18. Redesignate the succeeding section accordingly.

Page 663, after line 3, insert the following:

SEC. 966. AUTHORIZATION OF ADDITIONAL APPROPRIATIONS FOR THE JUDICIARY.

There is authorized to be appropriated to the Federal courts system \$10,000,000, to carry out such system's duties under this Act, for each of fiscal years 1989 through 1991.

Page 98, line 8, strike "specified date" and insert "date specified in subparagraph (A)".

Page 98, beginning in line 16, strike "seasonably received" and insert "received before or on the date specified in subparagraph (A)".

Page 127, beginning in line 14, strike ", and shall be upheld unless found to be arbitrary or capricious."

Page 192, line 4, strike out ", after notice and opportunity for hearing" and insert in lieu thereof "on the record, after opportunity for a hearing".

Page 193, line 7, insert the following after the period: "Any such regulation shall be issued in accordance with section 553 of title 5, United States Code."

Page 624, line 4, insert after "purpose)" the following: ", in which all issues shall be determined on the record pursuant to section 554 of title 5, United States Code,".

Page 625, line 17, strike out "In addition to" and all that follows through "if" on line 19 and insert in lieu thereof the following: "If the Board of Directors initiates a termination proceeding under paragraph (2), and".

Page 626, line 17, strike out "pending" and all that follows through line 20 and insert in lieu thereof the following: "until an order of the Board under paragraph (3) becomes final or until the Corporation dismisses the proceedings under paragraph (3)."

Page 628, line 8, strike the period and insert the following:

, except that a deposit shall remain insured to the extent that the depositor establishes that—

"(i) such deposit consists of additions made by automatic deposit the depositor was unable to prevent; or

"(ii) such depositor did not have notice of the suspension of insurance.

Page 156, line 4, strike "shall be free to" and insert "may either seek review within the Corporation under paragraph (6) or".

Page 157, beginning in line 6, strike "CLAIMS" and all that follows through line 21, and insert "CLAIMS.—If a claimant elects to seek review under this paragraph in lieu of filing suit under paragraph (3), the Corporation shall consider the claim de novo after opportunity for a hearing on the record. The final determination of the Corporation with respect to such claim shall be subject to judicial review under chapter 7 of title 5, United States Code."

Page 157, line 2, insert "under paragraph (2)" after "claim".

Page 649, beginning in line 3, strike "of any section set forth" and insert "described".

Page 653, beginning in line 12, strike "to violate any section set forth" and insert "to commit any violation described".

Page 660, beginning in line 16, strike "to violate any section set forth" and insert "to commit any violation described".

PURPOSE OF THE LEGISLATION

The purpose of the legislation is to reform, recapitalize, and consolidate the Federal deposit insurance system, and to enhance regulatory and enforcement powers of Federal financial institution regulatory agencies.

A detailed description of the purpose, background, and provisions of the bill is contained in Part I of this report.

COMMITTEE ACTION

H.R. 1278 was sequentially referred to the Committee on the Judiciary on May 16, 1989, for consideration of matters in its jurisdiction under Rule X, Clause 1(m) of the Rules of the House.

On May 24, 1989, the Committee on the Judiciary, the quorum being present, marked up H.R. 1278 and by a roll call vote of 30-1, ordered it favorably reported to the full House, with amendments.

EXPLANATION OF THE AMENDMENTS

SECTION 951. CIVIL PENALTIES

Subtitle E of Title IX contains proposed new civil penalties for certain violations involving financial institutions. As reported by the Committee on Banking, Finance and Urban Affairs, violations and conspiracies to violate eight sections of title 18 which relate to financial institutions are made the basis of civil penalties up to \$1,000,000 per day and a total of \$5,000,000.

These eight sections of title 18 are:

- 215 (bank bribery);
- 656 (misapplication and embezzling relating to banks);
- 657 (misapplication and embezzling relating to savings and loan institutions);
- 1005 (placing a false statement by an insider in the books of a bank);
- 1006 (placing a false statement by an insider in the books of a savings and loan institution);
- 1007 (making a false statement to the FDIC to induce the FDIC to enter into certain transactions);
- 1014 (making a false statement to a federally insured institution in order to obtain credit); and
- 1344 (bank fraud).

In addition, violations or conspiracies to violate the mail (18 U.S.C. 1341) and wire (18 U.S.C. 1343) fraud statutes could be the subject of such fines if the violations "affect a Federally insured financial institution."

These provisions, which are modifications of proposals contained in the Administration's bill, present substantial issues of both policy and constitutional dimensions.

The proposal is to authorize the imposition of civil penalties for the commission of certain criminal offenses. Explanatory material submitted by the Administration makes clear its intention to seek the imposition of these penalties in addition to, not as an alternative to, the criminal penalties which can be imposed for these violations. In fact, the Administration states that the penalties can also be cumulative to other civil penalties, which also may be up to \$1,000,000, which may be imposed by bank regulatory agencies under other provisions of this bill.

The \$1 million civil penalty is equal to the amount which this bill proposes as the maximum criminal fine for these same offenses.

Subtitle E is therefore intended to be used to impose a third monetary penalty, each of which may be up to \$1 million per incident, for the same violation, H.R. 1278 also calls for prison sentences of up to 20 years per incident for these violations.

The Committee on the Judiciary is of the opinion that this penalty provision is likely to be determined to be a criminal penalty. If this were the case, penalties imposed under the provision are likely to be declared unconstitutional on grounds of double jeopardy or of failure to provide criminal standards—such as trial by jury and proof beyond a reasonable doubt—for determination of guilt.

The Department of Justice, in defending this proposal and in response to court challenges to other civil penalty provisions, argues that the issue is simply one of labeling; if Congress makes clear its intent that a penalty is to be considered a civil penalty, it is civil.

However, Supreme Court precedents indicate that the courts will look beyond mere labeling to the substance and essence of the penalty.

A case decided by a unanimous decision of the Supreme Court of the United States on May 15, 1989, raises serious questions regarding the constitutionality of this provision.

That case (*U.S. v. Halper*) involved a person who had been convicted of 65 counts of False Claims Act violations, and sentenced to two years imprisonment and a fine of \$5,000. Based on this conviction, he was then assessed a civil penalty, which the statute set at \$2,000 per violation, twice the government's actual damages, and costs of the action. Since the case involved 65 acts of medicare fraud, in which services were billed at \$12 per unit instead of the authorized \$3 per unit, the damage to the government was \$585. Costs of the action to the government were estimated at \$16,000.

The court held that the statutory penalty of \$130,000 bore no rational relationship to the loss to the government, and that the penalty "crossed the line between remedy and punishment".

The Court held that such a "civil" penalty is, in reality, criminal punishment, and, when imposed following a criminal conviction, constitutes double jeopardy.

The Department of Justice has indicated that it is its intention to "cumulate" the \$1 million civil penalty with title 18 criminal penalties for the same conduct. Under those circumstances, unless it is shown that the civil penalty has a remedial rather than a punitive purpose, the civil penalty may fall within the double jeopardy prohibitions of *U.S. v. Halper*.

An amendment by Mr. Schumer was adopted in the Banking Committee markup which requires proof by clear and convincing evidence before the Justice Department can be awarded a civil penalty under this section. The bill as reported by the subcommittee did not articulate a standard of proof.

The rationale offered by Mr. Schumer for the amendment was twofold. First, these penalties frequently involve fraud, and a clear and convincing evidence standard is often used for civil fraud actions. Second, the seriousness of the penalty makes the clear and convincing standard appropriate. (As compared to the normal civil standard of preponderance of the evidence.)

While the clear and convincing evidence standard is more appropriate than a preponderance standard, which was the standard con-

tained in the bill as reported by the Banking Committee, for reasons articulated by Mr. Schumer, the Committee on the Judiciary is of the opinion it will not suffice if the penalty is found to be a criminal penalty, for which proof beyond a reasonable doubt would be required.

Judiciary Committee Amendment

The Committee on the Judiciary amended the civil penalty provisions in a number of ways to address the above concerns. The fundamental purpose of these changes is to modify this penalty provision to make it a civil penalty in fact and law as well as in name.

This is accomplished by tying the penalty to loss to the government. The maximum penalty which may be imposed is twice the amount of actual loss to the government.

The Committee amendment retains the "special rule for violations creating loss or gain" which was contained in the bill as reported by the Committee on Banking, Finance and Urban Affairs.

In the form it was originally reported, this provision would permit penalties in excess of the monetary caps contained in the bill, if the person against whom the penalty is being assessed derived pecuniary gain or caused pecuniary loss in excess of the statutory cap.

The special rule would now operate, in conjunction with the amendment of the Committee on the Judiciary, to permit civil penalties in excess of twice the actual loss to the Government, if the actual pecuniary gain or loss exceeded this amount. Since the Government may collect a penalty up to twice its loss, this provision would most likely be utilized in situations involving substantial losses to private parties and relatively small losses to the government.

Loss to the government includes any direct cost to the Government resulting from the fraud. It also includes costs in regulating, investigating and prosecuting civil and criminal cases with respect to the conduct that is the basis of the civil penalty being imposed. Finally, the amendment provides that loss to the government includes all monies paid out of any Federal deposit insurance fund and any other costs incurred by the Government as a result of such conduct.

This penalty, having been made civil or remedial by this amendment, can be imposed constitutionally in addition to criminal penalties, including fines up to \$1 million dollars, for the same conduct.

The Committee made two other changes which it determined were appropriate, based on the fact that the civil penalty had been made remedial.

First, the \$1 million cap on the penalty was removed. The penalty is now based on loss to the government. If the individual in question caused losses in excess of \$1 million, it would be inappropriate to cap his penalty at this amount.

Second, the burden of proof which the government must meet before such a penalty can be imposed is changed from "by clear and convincing evidence" to "by the preponderance of the evidence".

The "clear and convincing" standard was added to the bill at least in part out of concern that the penalty had features which might be considered punitive, rather than remedial. Since the penalty is now clearly remedial and civil, the Committee concluded that the customary civil law burden of proof of "by the preponderance of the evidence" is the proper standard.

SECTION 963 (A). CIVIL FORFEITURE FOR BANKING OFFENSES

Section 963(a) in the bill referred to the Committee on the Judiciary would have added a new civil forfeiture subsection to the existing money laundering forfeiture provision (18 U.S.C. Sec. 981). This would have been applicable to the banking offenses outlined in Section 215, 656, 657, 1005, 1006, 1007, 1014, 1344, of title 18, and to the mail and wire fraud statutes (18 U.S.C. 1341 and 1343). Forfeiture would only apply in circumstances "affecting a federally insured financial institution".

This section then went on to set up new procedures for the disposal of property or proceeds forfeited and stated that they "*shall*" (emphasis added) be disbursed, "Notwithstanding any other provision of law * * * according to the following priorities, in *descending order as they are listed*": (emphasis added)

(A) To any Federal financial institution regulatory agency to the extent of such agency's contribution of "resources to, or expenses involved in the seizure and forfeiture, and the investigation leading to the seizure and forfeiture".

In this fashion all expenses including the cost of Federal investigation by regulatory agencies (which were not the subject of reimbursement under the Department of Justice existing procedures) would have been reimbursed to the Federal regulatory agency as *the* priority.

(B) To the Attorney General to the extent of the Department of Justice's contribution of resources, etc., including the investigation leading directly to the seizure and forfeiture.

As stated above the investigation costs have never been reimbursed under existing forfeiture procedures. It is also noteworthy that only at this Stage B was the Attorney General allowed to deduct expenses for maintenance of custody, advertising and court costs. If the total costs of expenses and investigations in (A) above exceeded the amount received in a forfeiture, the expenses of maintenance of custody, advertising and court costs would have had to come from some other source, probably the existing Department of Justice Assets Forfeiture Fund (28 U.S.C. Section 524(c)(1)(A)). Under existing procedures, these expenses are the first to be paid from money in the Forfeiture Fund. The Forfeiture Fund under this proposal could have been *subsidizing* the Federal regulatory agencies to the detriment of drug-related investigations and other costs.

The section went on to mandate disbursements to (C) "any Federal financial institution regulatory agency" to reimburse claimants or creditors and the agency's insurance fund if the financial institution was in receivership, and then (D) if the financial institution was not in receivership, "to the General Fund of the Treasury" or make property or proceeds available for "restitution to the financial

institution" on the order of the appropriate Federal regulatory agency.

These far-reaching set-asides from the forfeiture of assets was unprecedented and the Committee on the Judiciary determined that they were not justified. At the very least, this would have compromised the appropriations process in the investigative area as it relates to the Department of Justice, and it had the potential for a serious drain on the existing forfeiture fund.

The Committee on the Judiciary amended this section to allow the use of civil forfeiture in banking related offenses, and has added sections 215, 656, 657, 1005, 1006, 1007, 1014 and 1334 to 18 U.S.C. Section 981. The disposition of these assets, however, will be under standard procedures which already make Federal regulatory agencies eligible for the forfeited property (see 18 U.S.C. Section 981(e) (1)), but on a discretionary basis and after expenses are paid. The amendment also allows the *regulatory* agencies to recoup their investigative costs and allow funds to be paid to them for claimants, creditors and the agency's insurance fund if the financial institution is in receivership, or to the financial institution itself on order of the appropriate Federal regulatory authority. This also would be on a discretionary basis if there is money available from forfeiture under the banking laws. The mail and wire fraud provisions were deleted from this section due to the breadth of these statutes and so the term "affecting a Federally insured financial institution" was deleted since the eight sections remaining relate to banking offenses.

Criminal Forfeiture

Section 963(b) adds Sections 215 (receipt of commissions or gifts for procuring loans); 656 (theft, embezzlement or misapplication by bank officer or employee); 657 (theft, embezzlement or misapplication by lending, credit and insurance institution); 1005 (fraudulent bank entries, reports and transactions by bank officers or employees); 1006 (fraudulent entries, reports, and transactions by officers or employees of Federal credit institutions); 1007 (fraudulent transactions with the Federal Deposit Insurance Corporation); 1014 (fraudulent statements, reports on loans and credit applications generally; renewals and discounts; and crop insurance); 1344 (bank fraud generally) of title 18 and the mail and wire fraud statutes (18 U.S.C. 1341, 1344) to the criminal forfeiture section of the Money Laundering Act in cases in offenses "affecting" a financial institution.

The Committee added Section 1006 to this subsection because it believes it was left out of the bill by inadvertence. The Committee also made some technical corrections to conform this portion of the bill with language added in the 1988 Anti-Drug Abuse Act. Otherwise, this subsection is essentially the same as reported by the Committee on Banking.

SECTION 966. JUDICIAL BRANCH AUTHORIZATION

The bill as reported by the Committee on Banking, Finance and Urban Affairs provided no authorization for funding for the Judicial branch to meet the expected workload generated by this bill.

The Judiciary Committee amendment authorizes \$10 million for the Judicial branch to carry out its duties as proposed by this bill.

The purpose of the amendments to assure that adequate resources are provided to the judiciary to meet the certain caseload and workload increases that this bill will generate. While often anticipating the resource requirements of the executive branch and the proposals that have a tremendous impact on the judiciary without providing concomitant resources. In the view of the Committee, the result has been a growing workload for the judiciary and a growing inability to handle that workload to a standard acceptable to this branch and the judiciary. This amendment anticipates the impact of this legislation on the judicial branch. This need to consider the judiciary was recently recognized by Attorney General Thornburgh who testified that needs and resources of the Department of Justice and the Judicial branch should be kept in balance.

Although the specific usage of the authorization is not spelled out by this amendment, it is anticipated that as a result of this bill there will be substantial additional filings of complex litigation in the courts—both the Article III courts and potentially the bankruptcy courts. This will require additional personnel, automation equipment, jurors and other supporting resources. Inasmuch as the appropriations process has resulted in a substantial shortfall for the judiciary, it becomes even more important for the Congress to specifically denominate authorizations in adopting legislation that is certain to produce a notable judicial impact.

SECTION 965. CRIMINAL DIVISION FRAUD SECTION REGIONAL OFFICE

Section 965 of the Banking Committee amendment would mandate that, within 120 days of enactment, the Department of Justice establish two regional offices of the Fraud Section of the Criminal Division of the Department.

These offices are to be established in the Central District of California (Los Angeles) and the Northern District of Texas (Dallas).

Section 965 of the Banking Committee amendment also calls on the GAO to study and report if still other such offices should be established.

The Judiciary Committee amendment would delete this section. The Committee has in the recent past opposed proposals to mandate specific staffing levels and operational structures for individual field units of agencies or components of the Department of Justice.

The Committee feels that such legislative micro-management is inappropriate, in that such decisions are management decisions which should more appropriately be the executive branch.

Section 965 of the Banking Committee amendment not only mandates the establishment of particular field units in particular locations, but also mandates a particular case management structure different from that established by the Attorney General. At the present time, the individual United States Attorneys are responsible for prosecution of the criminal violations in question. By mandating regional offices of the Criminal Division in these two locations, H.R. 1278, as reported by the Banking Committee, has the effect of

shifting management of these cases from the U.S. Attorneys in question to Department officials in Washington.

The Committee believes that Congress should mandate management decisions such as Section 965 proposes only under the most extraordinary circumstances. One such circumstance would be a showing of a failure of the existing structure, and an unjustified refusal of the Attorney General to implement changes.

No such record exists, and the Committee therefore believes that section 965 is inappropriate and should be stricken.

SECTION 962. OBSTRUCTION OF CRIMINAL INVESTIGATIONS

Section 962(c) would establish a new title 18 felony offense of obstruction of criminal investigations. Punishable by imprisonment up to 5 years and a fine of \$250,000, it is applicable to officers and employees of financial institutions who notify bank customers or targets of grand jury investigations of the existence or contents of federal grand jury subpoenas received by the bank for customer records.

The Committee on the Judiciary does not feel that felony penalties should be imposed upon individuals who disclose the existence or contents of such subpoenas, but do so without criminal intent to obstruct the administration of justice.

Accordingly, section 962(c) is amended to require such a showing of intent in felony prosecutions under the new offense.

However, the Committee accepts the Administration's argument that some penalty is needed for disclosures by financial institution officials and employees to individuals who are subjects of criminal investigations. Any such disclosure, even if it is not made with a specific intent to obstruct justice, could jeopardize a criminal investigation. The Committee therefore agreed to establishing a penalty of no more than one year in prison and a fine as specified in title 18 for disclosures made with a "knowing" state of mind.

SECTION 212. INSURANCE FUNDS; CORPORATION POWERS AS RECEIVER

Subsection 212(5), "Notice Requirements", as recommended by the Banking Committee, establishes a new subsection (c)(3) in 12 U.S.C. 1821 which sets forth the procedures for notice to claimants, resolution of claims, and time periods for the resolution of claims.

The Judiciary Committee made only technical amendments to this subsection to clarify cross-references and to update the language of the provision.

Subsection 212(5), "Payment of Insured Debts", establishes a new subsection (f) in 12 U.S.C. 1821. As recommended by the Banking Committee, this subsection establishes procedures for the payment of insured deposits; provides for the approval or rejection of claims; authorizes the establishment of rules and procedures for "due process" as to such claims; and provides for judicial review in the Circuit Courts with the standard of review of "arbitrary and capricious". It also establishes time periods for the filing of appeals with the Courts and authorizes the Corporation to require the "exhaustion of remedies" at the administrative level before an action on a claim may be brought.

The Judiciary Committee amended this subsection to delete the sentence which provided that judicial review of these decisions would be under the standard of "arbitrary and capricious". The result of this deletion is that judicial review of these decisions will be under the standards of review established by the Administrative Procedure Act, 5 U.S.C. 706. These are the appropriate standards of review for final agency decisions such as those provided for under this section.

Subsection 212(5), "Rulemaking and Claims Determination Authorized", establishes a new subsection (1) in 12 U.S.C. 1821. As recommended by the Banking Committee, this new subsection authorizes the Corporation to make rules and regulations for the conduct of conservatorships and receiverships, and the allowance of claims and "consensual administrative adjudication". It provides for judicial review of decisions made under these rules and regulations only as this subsection itself provides; and if administrative adjudication is the selected alternative, the only judicial review available will be that provided by the Corporation's regulations.

The Judiciary Committee amended this subsection both to clarify its provisions and to ensure that it comports with Supreme Court requirements for adjudication of claims as established in *Colt Independence Joint Venture v. FSLIC*, No. 87-996, 57 L.W. 4347 (Slip opinion issued March 21, 1989).

The Committee amendment provides that after an initial decision on a claim, every claimant has the right to bring an action on that claim in a United States District Court. If there is no initial decision within 180 days, a claimant may file an action on that claim in the appropriate district court. However, the provision as amended also gives claimants the option, instead of bringing an action on the initial decision in district court, of selecting a de novo consideration of the claim with an opportunity for a hearing on the record, i.e., pursuant to the Administrative Procedure Act, 5 U.S.C. 554. If the claimant selects this option, judicial review of the administrative determination will be pursuant to the Administrative Procedure Act, rather than de novo. In addition, the Corporation is directed to establish procedures for alternative dispute resolution, so that a claimant may select such procedures for review of the initial decision in lieu of a formal hearing, de novo, under the Administrative Procedure Act. Of course, because this provision addresses only judicial remedies, it in no way affects a claimant's right to pursue such non-judicial remedies as non-judicial foreclosure on real property.

SECTION 219 (5). ACTIVITIES OF SAVINGS ASSOCIATIONS SUBSIDIARIES

As recommended by the Banking Committee, Section 219(5) establishes a new subsection (m) in 12 U.S.C. 1828. This new subsection authorizes the Corporation to determine, after notice and opportunity for a hearing, whether an insured savings association may continue its ownership of, control of, or relationship with a company. The Corporation may order the association to divest of such company or take any other steps that the Director determines are appropriate. Under this section, the Corporation is also directed to issue regulations of general applicability.

The Judiciary Committee amended this subsection to clarify that the hearing under this section is subject to the procedures provided in 5 U.S.C. 554, and that judicial review will therefore be pursuant to the Administrative Procedure Act, chapter 7 of title 5. The amendment also makes it explicit that the regulations issued under this section must be issued pursuant to the procedures of the Administrative Procedure Act, 5 U.S.C. 553.

SECTION 926. REVISION OF PROCEDURES FOR TERMINATION OF FDIC DEPOSIT INSURANCE

Section 926 amends 12 U.S.C. 1818(a). This section, as recommended by the Banking Committee, establishes the circumstances and procedures under which the Corporation may terminate the FDIC deposit insurance of a financial institution. The section provides for notice and a hearing regarding the intention to terminate insurance, but does not state if the hearing is conducted pursuant to the Administrative Procedure Act. This section authorizes the suspension of insurance, but sets no time limits on the length of such suspension. This section also addresses judicial review of the decision to terminate insurance, but the bill itself does not make clear the type of judicial review that is available or the standards of review that will be applied.

The Judiciary Committee amended this section to make it explicit that a decision to terminate insurance may be made only after affording the institution a hearing conducted pursuant to the Administrative Procedure Act, 5 U.S.C. 554. As a result, these decisions will also be subject to judicial review pursuant to the Administrative Procedure Act, chapter 7 of title 5.

The Committee also amended this section to make it explicit that the newly authorized power to suspend insurance may be exercised by the Corporation only if the suspension is ancillary to a proceeding to terminate insurance, and that a suspension may last only for that period during which the termination decision is being made.

Finally, the Committee amended this section to provide that automatic deposits which cannot be prevented after the issuance of a notice of suspension will nevertheless be covered by insurance; and that additions to deposits made by individuals who do not have notice of a suspension of insurance will also continue to be covered by insurance.

OVERSIGHT FINDINGS

The Committee makes no oversight findings with respect to the amendments it adopted, and the Committee has not received any oversight findings from the Committee on Government Operations.

NEW BUDGET AUTHORITY

With regard to clause 2(1)(3)(B) of rule XI of the Rules of the Houses of Representatives, the amendments adopted by the Committee to H.R. 1248 create no new budget authority.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(D)(4) of rule XI of the Rules of the House of Representatives, the Committee finds that the amendments adopted by the committee bill will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

COST ESTIMATE

In regard to clause 7 of rule XIII of the Rules of the House of Representatives, the Committee has received no cost estimate from the Congressional Budget Office in regard to the amendments that it has adopted.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

The bill was referred to this Committee for consideration of such provisions of the bill, and the amendment reported by the Committee on Banking, Finance and Urban Affairs, as fall within the jurisdiction of this Committee pursuant to clause 1(m) of Rule X of the Rules of the House of Representatives. The changes made to existing law by the amendment reported by the Committee on Banking, Finance and Urban Affairs are shown in the supplemental report filed by that Committee.

For the information of the Members of the House of Representatives, changes made by this Committee to existing law as amended by the Committee on Banking, Finance and Urban Affairs are shown as follows (matter proposed to be omitted is enclosed in black brackets, new matter is printed in italic, matter in which no change is proposed is shown in roman):

FEDERAL DEPOSIT INSURANCE ACT

* * * * *

SEC. 8. (a) TERMINATION OF INSURANCE.—

(1) * * *

* * * * *

(3) HEARING: TERMINATION.—If, on the basis of the evidence presented at a hearing before the Board of Directors (or any person designated by the Board for such purpose), *in which all issues shall be determined on the record pursuant to section 554 of title 5, United States Code*, and the written findings of the Board of Directors (or such person) with respect to such evidence (which shall be conclusive), the Board of Directors finds that any unsafe or unsound practice or condition or any violation specified in the notice to an insured financial institution under subparagraph (B) has been established, the Board of Directors may issue an order terminating the insured status of such financial institution effective as of a date subsequent to such finding.

* * * * *

(8) TEMPORARY SUSPENSION OF INSURANCE.—

(A) IN GENERAL.—[In addition to the foregoing administrative proceedings described in subsection (a)(1), if] *If the Board of Directors initiates a termination proceeding under*

paragraph (2), and the Board of Directors, after consultation with the appropriate Federal banking agency, finds that—

(i) an insured financial institution (other than a savings association) has no common or perpetual noncumulative preferred equity capital, or its equivalent for mutual institutions; or

(ii) a savings association has no risk-adjusted capital and no core capital (as determined under section 5(t) of the Home Owners' Loan Act of 1933),

the Corporation may issue a temporary order suspending deposit insurance on all deposits received by the institution after the effective date of such order.

(B) EFFECTIVE PERIOD OF TEMPORARY ORDER.—Such order shall become effective not earlier than 10 days from the date of service upon the institution and, unless set aside, limited or suspended by a court in proceedings authorized hereunder, such temporary order shall remain effective and enforceable [pending completion of the administrative proceedings or until the Corporation shall dismiss such administrative proceedings.] *until an order of the Board under paragraph (3) becomes final or until the Corporation dismisses the proceedings under paragraph (3).*

* * * * *

(G) LACK OF NOTICE.—The failure of a depositor to receive notice shall not affect the effectiveness of any order issued under this paragraph, *except that a deposit shall remain insured to the extent that the depositor establishes that—*

(i) such deposit consists of additions made by automatic deposit the depositor was unable to prevent; or

(ii) such depositor did not have notice of the suspension of insurance.

* * * * *

SEC. 11. (a) * * *

* * * * *

(c) CORPORATION AS CONSERVATOR OR RECEIVER.—

(1) * * *

* * * * *

(3) NOTICE OF REQUIREMENTS.—

(A) * * *

* * * * *

(C) CLAIMS DISALLOWED AFTER END OF PERIOD.—Claims filed after the [specified date] *date specified in subparagraph (A)* shall be disallowed (and such disallowance shall be final) except that any claim later filed may be considered if the claimant that holds such a claim did not have notice of the conservatorship or receivership in time for filing of such claim and such claim is filed in time to permit payment of such claim.

(D) The receiver shall allow any claim [seasonably received] *received before or on the date specified in subparagraph (A)* and proved to its satisfaction. The receiver may wholly or partly disallow any creditor claim or claim of security, preference, or priority not so proved, and shall within 180 days notify the claimant of the disallowance and the reason therefor. Mailing notice of the disallowance of the claimant's last address appearing on the financial institution's books or on the proof of claim shall be sufficient notice. Unless, within 30 days after notice is mailed, the claimant files a written objection to the disallowance, disallowance shall be final. Those claims to which an objection is properly and timely filed shall be decided in accordance with provisions of subsection (1).

* * * * *

(f) PAYMENT OF INSURED DEPOSITS.—

(1) * * *

* * * * *

(4) Final determination made by the Corporation shall be reviewable by the United States Court of Appeals for the District of Columbia or the court of appeals for the Federal judicial circuit where the principal place of business of the financial institution is located [, and shall be upheld unless found to be arbitrary or capricious].

* * * * *

(1) RULEMAKING AND CLAIMS DETERMINATION AUTHORIZED.—

(1) * * *

* * * * *

(3) Within 60 days after the end of the period provided in paragraph (2), or within 60 days after the Corporation denies the claim, whichever is sooner, a claimant [shall be free to] *may either seek review within the Corporation under paragraph (6) or file a suit in the district or territorial court of the United States held within the district in which the financial institution's principal place of business is located or in the district court for the District of Columbia, or to continue a suit filed before the appointment of a receiver.*

* * * * *

(5) There shall be no judicial review of the Corporation's decision not to allow a claim *under paragraph (2)*. A claimant's only remedy shall be to file or continue a suit as provided in paragraphs (3) and (4).

(6) ADMINISTRATIVE DETERMINATION OF [CLAIMS.—

[(A) The authority to determine claims shall only be exercised after the Corporation has established rules and regulations, in accordance with section 553 of title 5, United States Code.

[(B) In establishing rules or regulations for the administrative adjudication of claims, the Corporation should consider, among other procedures, the use of alternative dis-

pute resolution as set forth below or consensual submission of the claim to an administrative law judge.

[(C) A claimant who selects an administrative adjudication of claims under this subsection shall be limited to judicial review as provided in the rules and regulations promulgated by the Corporation pursuant to this subsection.]

CLAIMS.—If a claimant elects to seek review under this paragraph in lieu of filing suit under paragraph (3), the Corporation shall consider the claim de novo after opportunity for a hearing on the record. The final determination of the Corporation with respect to such claim shall be subject to judicial review under Chapter 7 of title 5, United States Code.

* * *
SEC. 18. (a) * * *

* * *
(m) ACTIVITIES OF SAVINGS ASSOCIATIONS SUBSIDIARIES.—

(1) * * *

(2) ENFORCEMENT POWERS.—With respect to any company controlled by an insured savings association—

(A) the Corporation and the Director of the Office of Thrift Supervision shall each have, with respect to such company, the respective powers and authorities that each may possess with respect to the insured savings association under this section or section 8; and

(B) the Director of the Office of Thrift Supervision or the Corporation, as appropriate, may—

(i) determine[, after notice and opportunity for hearing] *on the record, after opportunity for a hearing*, that the continuation by the insured savings association of its ownership or control of, or its relationship to, the company—

* * *
(3) ACTIVITIES INCOMPATIBLE WITH DEPOSIT INSURANCE.—

(A) REGULATIONS.—

(i) IN GENERAL.—The Board of Directors may determine, by regulation of general applicability to all State savings associations, that any specific activity poses a serious threat to the Savings Association Insurance Fund. *Any such regulation shall be issued in accordance with section 553 of title 5, United States Code.*

* * *

TITLE 18, UNITED STATES CODE

* * *

PART I—CRIMES

CHAPTER 46—FORFEITURE

§ 981. Civil forfeiture

(a)(1) Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:

(A) * * *

[(D) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title, or a conspiracy to commit such a violation, affecting a financial institution.]

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 656, 657, 1005, 1006, 1007, 1014, or 1344 of this title.

(e) Notwithstanding, [With respect to property described in subparagraph (A), (B), or (C) of subsection (a) of this section, notwithstanding] any other provision of the law, except section 3 of the Anti Drug Abuse Act of 1986, the Attorney General or the Secretary of the Treasury, as the case may be, is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may [determine to—] *determine—*

[(1) any other Federal agency; or

[(2) any State or local enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property.]

(1) to any other Federal agency;

(2) to any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property;

(3) in the case of property referred to in subsection (a)(1)(C) (if the affected financial institution is in receivership or liquidation), to any Federal financial institution regulatory agency—

(A) to reimburse the agency for payments to claimants or creditors of the institution; and

(B) to reimburse the insurance fund of the agency for losses suffered by the fund as a result of the receivership or liquidation;

(4) in the case of property referred to in subsection (a)(1)(C) (if the affected financial institution is not in receivership or liquidation), upon the order of the appropriate Federal financial institution regulatory agency, to the financial institution as restitution, with the value of the property so transferred to be set off against any amount later recovered by the financial institution as compensatory damages in any State or Federal proceedings; or

(5) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency, to the extent of the agency's contribution of resources to, or expenses involved in, the seizure and forfeiture, and the investigation leading directly to the seizure and forfeiture, of such property.

The Attorney General or the Secretary of the Treasury, as the case may be, shall ensure the equitable transfer pursuant to paragraph (2) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General or the Secretary of the Treasury pursuant to paragraph (2) shall not be subject to review. The United States shall not be liable in any action arising out of the use of any property the custody of which was transferred pursuant to this section to any non-Federal agency. The Attorney General or the Secretary of the Treasury may order the discontinuance of any forfeiture proceedings under this section in favor of the institution of forfeiture proceedings by State or local authorities under an appropriate State or local statute. After the filing of a complaint for forfeiture under this section, the Attorney General may seek dismissal of the complaint in favor of forfeiture proceedings under State or local law. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, the United States may transfer custody and possession of the seized property to the appropriate State or local official immediately upon the initiation of the proper actions by such officials. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, notice shall be sent to all known interested parties advising them of the discontinuance or dismissal. The United States shall not be liable in any action arising out of the seizure, detention, and transfer of seized property to State or local officials. *The United States shall not be liable in any action arising out of a transfer under paragraph (3), (4), or (5) of this subsection.*

* * * * *

[(j)(1) Whenever property described in subsection (a)(1)(D) is forfeited under this section, the Attorney General may sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public.

[(2) Notwithstanding any other provision of law, the Attorney General shall dispose of the property or proceeds from the sale of such property according to the following priorities, in descending order as they are listed:

[(A) The Attorney General shall transfer the property or proceeds to any Federal financial institution regulatory agency to the extent of such agency's contribution of resources to, or expenses involved in, the seizure and forfeiture, and the investigation leading directly to the seizure and forfeiture, of such property.

[(B) The Attorney General shall retain property and proceeds from the sale of such property to the extent of the Attor-

ney General's contribution of resources to, or expenses involved in, the seizure and forfeiture, and the investigation leading directly to the seizure and forfeiture, of such property. Such expenses include expenses for maintenance of custody, advertising, and court costs.

[(C) If the affected financial institution is in receivership or liquidation, the Attorney General shall transfer the property or proceeds to any Federal financial institution regulatory agency—

[(i) to the extent such property or proceeds reimburse that agency for payments to claimants or creditors of the institution; and

[(ii) to the extent such property or proceeds reimburse the agency for losses suffered by that agency's insurance fund as a result of the receivership or liquidation.

[(D) If the affected financial institution is not in receivership or liquidation, the Attorney General shall transfer the property or proceeds, to the General Fund of the Treasury or may make such property or proceeds available upon the order of the appropriate Federal financial institution regulatory agency as restitution to that financial institution. Amounts received by the financial institution shall be set off against any amounts later recovered by the institution as compensatory damages in any State or Federal proceeding.

[(3) The United States shall not be liable in any action arising out of a transfer made under this subsection.]

(j) [(k)] For purposes of this section—

(1) the term "Attorney General" means the Attorney General or his delegate; and

(2) the term "Secretary of the Treasury" means the Secretary of the Treasury or his delegate.

§ 982. Criminal forfeiture

(a) (1) The court, in imposing sentence on a person convicted of an offense under section 1956 or 1957 of this title shall order that the person forfeit to the United States any property, real or personal, which represents the gross receipts the person obtained, directly or indirectly, as a result of such offense, or which is traceable to such gross receipts.

(2) The court, in imposing sentence on a person convicted of an offense under section 215, 656, 657, 1005, 1007, 1014, 1341, 1343, or 1344 of *this title*, or a conspiracy to commit such an offense, affecting a financial institution, shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

[(b) Property subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed—

[(1) in the case of a forfeiture under subsection (a)(1) of this section, by subsections (c) and (e) through (o) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970; and

[(2) in the case of a forfeiture under subsection (a)(2) of this section, by subsections (b), (c), (e), and (g) through (p) of section 413 of such Act.]

(b)(1) Property subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed—

(A) in the case of a forfeiture under subsection (a)(1) of this section, by subsections (c) and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853); and

(B) in the case of a forfeiture under subsection (a)(2) of this section, by subsections (b), (c), (e), and (g) through (p) of section 413 of such Act.

(2) The substitution of assets provisions of subsection 413(p) shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense.

CHAPTER 73—OBSTRUCTION OF JUSTICE

* * * * *

§ 1510. Obstruction of criminal investigations

(a) Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

(b) Whoever, being an officer, director, partner, employee, or attorney of a financial institution, knowingly notifies, directly or indirectly—

(1) a customer of that financial institution whose records are sought by a grand jury subpoena that has been served relating to—

(A) a possible violation of—

(i) section 215, 656, 657, 1005, 1006, 1007, 1014, or 1344; or

(ii) section 1341 or 1343 affecting a financial institution; or

(B) a possible conspiracy [to violate any section set forth] to commit any violation described in either clause of subparagraph (A); or

(2) a target of a grand jury investigation in connection with which such a subpoena has been served, about the existence or contents of that subpoena, or information that has been furnished to the grand jury in response to that subpoena shall be fined under this title or imprisoned not more than [5 years, or both.] 1 year, or both, or, if the offense was committed with the intent to obstruct the enforcement of the subpoena or to obstruct any other proceeding, shall be fined under this title or imprisoned not more than 5 years, or both.

* * * * *

PART II—CRIMINAL PROCEDURE

CHAPTER 213—LIMITATIONS

Sec.

3281. Capital offenses.

3293. Financial institution offenses.

§ 3293. Financial institution offenses

No person shall be prosecuted, tried, or punished for—

- (1) a violation of section 215, 656, 657, 1005, 1006, 1007, 1014, or 1344;
 - (2) a violation of section 1341 or 1343, if the offense affects a financial institution; or
 - (3) a conspiracy to commit a violation [of any section set forth] *described* in paragraph (1) or (2),
- unless the indictment is returned or the information is filed within 10 years after the commission of the offense.

CHAPTER 215—GRAND JURY

Sec.

3321. Number of grand jurors; summoning additional jurors.

3322. Disclosure of certain matters occurring before grand jury.

§ 3322. Disclosure of certain matters occurring before grand jury

(a) An attorney for the government (as defined in the Federal Rules of Criminal Procedure), and a person to whom matters have been disclosed under rule 6(e)(3)(A)(ii) of such Rules, may disclose matters occurring before a grand jury concerning a banking law violation to another attorney for the government for use in enforcing section 951 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989.

(b)(1) Upon motion of an attorney for the government, a court may direct disclosure of matters occurring before a grand jury during an investigation of a banking law violation to identified personnel of a financial institution regulatory agency—

(A) for use in relation to any matter within the jurisdiction of such regulatory agency; or

(B) to assist an attorney for the government to whom matters have been disclosed under subsection (a).

(2) A court may issue an order under paragraph (1) only upon a finding of particularized need.

(c) A person to whom matter has been disclosed under this section—

(1) in the case of a disclosure under subsection (a) or (b) for the purpose set forth in paragraph (1)(B), shall not utilize the matter disclosed for any purpose other than to enforce section 951 of the Financial Institution Reform, Recovery and Enforcement Act of 1989; and

(2) in the case of a disclosure under subsection (b) for the purpose set forth in paragraph (1)(A), shall not utilize the matter disclosed other than in relation to any matter within the jurisdiction of such regulatory agency.

(d) As used in this section, the term "banking law violation" means—

(1) a violation of—

(A) section 215, 656, 657, 1005, 1007, 1014, or 1344; or

(B) section 1341 or 1343 affecting a financial institution;

or

(2) a conspiracy [to violate any section set forth] *to commit any violation described in paragraph (1).*

* * * * *

SUPPLEMENTAL VIEWS CONCERNING CAPITAL STANDARDS

In its consideration of H.R. 1278, the Judiciary Committee rightly rejected an amendment which would have given a *special group* of savings and loans with significant amounts of supervisory goodwill the right to a time-consuming administrative hearing prior to enforcement of the capital standards. This amendment was cast as an effort to secure due process for these thrifts. But its practical effect would have been to delay the enforcement of the capital standards for a select group of thrifts. Had this amendment passed, that delay would have seriously damaged the enforceability of the capital standards crafted by the House Banking Committee. And it is those standards which are of the heart of this legislation.

The capital standards were the central issue in the debate over H.R. 1278 in the House Banking Committee because the lack of adequate capital was perhaps the single greatest contributor to the magnitude of the rescue that the taxpayers now have to underwrite. Capital is important because it serves as a buffer protecting the insurance fund and the taxpayer from the losses of a troubled thrift. As Secretary of the Treasury James Brady testified:

We are experiencing the results today of an industry that collectively has not been adequately capitalized. We have learned a valuable lesson: Deposit insurance simply will not work without sufficient private capital at risk and up front.

Comptroller General Bowsheer emphasized that point in a letter to Banking Committee Chairman Gonzalez and Ranking Minority Member Congressman Wylie:

* * * inadequate capital creates incentives for institutions to engage in unsafe and unsound practices. These practices can, and often do, result in losses to the deposit insurance funds. The taxpayer is now facing a problem of unprecedented proportions due, in no small measure to our prior lack of insistence upon adequate tangible capital requirements. Adequate tangible capital provides a buffer to protect the insurance funds and, therefore, the taxpayer from loss and instills discipline in an institution's management since it is the owners' own capital which is at risk.

Some thrifts claim that agreements they may have reached in connection with the acquisition of a troubled savings and loan in the past exempt them from both current capital standards and any future standards. In fashioning the standards contained in section 314, the Banking Committee considered a large number of amendments which would have allowed the inclusion of supervisory goodwill in capital and expressly rejected each one. The primary goal of

this legislation is to ensure that the taxpayers are never again required to shoulder such an enormous cost. Allowing illusory items such as goodwill to count as capital would mean that we cannot provide the assurance of "never again" to the American taxpayer.

The debate over this amendment in the Judiciary Committee centered, not on the administrative procedures to be established, but rather on the appropriateness of including goodwill in capital. But the debate missed the point. No one argued that goodwill was a real asset with value that protects the taxpayers. That argument, which is the only way to justify inclusion of goodwill in capital, cannot be made. Goodwill is not real money. Allowing a thrift to count worthless goodwill as capital leaves the taxpayer bare of protection.

But, even though most all agree that supervisory goodwill is not a valuable asset, some thrifts with significant amounts of goodwill argue that it should be counted as capital. Not counting goodwill would cause some thrifts that appear to have adequate capital with goodwill counted not to be in compliance with the standards. These thrifts argue that by not including goodwill in capital, the government would be taking healthy thrifts and making them unhealthy. But whether a thrift is financially healthy does not depend on how capital is defined. Clearly, lowering the capital standards so that all thrifts no matter how weak are in compliance would not magically make all weak thrifts strong. Similarly, allowing undercapitalized thrifts to count gimmicks as capital does not make them any better capitalized nor any less of a threat to the taxpayers.

The defeated amendment would have delayed implementation of the capital standard for years. But it would also significantly increase the already untenable burden shouldered by the regulators and greatly hamper their ability to deal with the savings and loan crisis. The regulators, already swamped by the worst financial crisis since the Depression, would be required by the amendment to divert substantial time and scarce personnel to conduct potentially hundreds of administrative hearings. Moreover, until that procedure is complete, the regulators would be precluded from taking most actions to reduce the risks to the insurance fund and the taxpayers. The delay combined with the strict limits on the ability of the regulators to act is deeply troubling.

Over the past decade, time and again the regulators and the Congress chose to lower the standards rather than act as the industry became weaker. Forbearance from capital standards has been widely identified as the central reason that a significant problem has ballooned into an unprecedented financial catastrophe requiring hundreds of billions of dollars.

The lesson of the past decade is too clear to ignore and the consequences of failing once again to require real, tangible capital in insured banks and thrifts too disastrous to contemplate. That lesson is valuable but it has also been enormously costly.

We cannot afford to make the same mistakes again.

CHARLES E. SCHUMER.

ADDITIONAL VIEWS OF MR. HYDE ON H.R. 1278

The "Financial Institutions Reform, Recovery and Enforcement Act of 1989" (H.R. 1278) is an attempt to respond to the most serious deposit insurance crisis that has faced our country since the Depression. The bill would significantly expand the supervisory and enforcement authority of the Federal Government with respect to the thrifts. It also would establish a well-capitalized and independent thrift insurance fund to protect depositors.

The overall aim is to make savings and loan associations as financially stable as commercial banks. They would do this by meeting a new set of risk-based capital standards. Unfortunately, the manner in which Congress is choosing to apply these new capital standards has resulted in a serious inequity with respect to a number of thrifts throughout the United States.

In the early part of this decade, the Federal Home Loan Bank Board encouraged financially healthy thrifts to take over (i.e., merge with) a number of failing savings and loans. This was a publicly announced federal regulatory policy that was pursued and fostered by both the Bank Board and the Federal Savings and Loan Insurance Corporation (FSLIC). It was done as a means of saving the Federal Government and the American taxpayers money. Over one hundred failing thrifts were taken over as a result of this effort. Estimates are that at least \$13 billion was saved as a result of these "encouraged mergers."

These transactions appear to have taken place in the following manner. The healthy thrifts acquired both failed and failing institutions under written agreements executed by both of the private parties with the FSLIC. Those agreements entitled the thrifts to enjoy specified treatment of supervisory goodwill and reduced net worth requirements. The FSLIC's standard Assistance Agreement provided that an acquisition by a healthy thrift of a failed or failing institution was to be accounted for under the purchase method. That recognized accounting method allows the purchaser to offset the excess liabilities of the acquired institution with an equal amount of supervisory goodwill on its balance sheet. The Assistance Agreement also incorporated FSLIC regulations, which treated supervisory goodwill as an asset for purposes of calculating net worth. The Assistance Agreement typically provided that, notwithstanding generally applicable regulatory net worth requirements, the net worth of the merged institution need not exceed a specified lower percentage of its liabilities during a period of years after the acquisition date. In addition, the Agreement permitted supervisory goodwill to be amortized over periods of up to forty years. Parallel provisions are continued in the FHLBB Resolution approving the same acquisitions.

So, the healthy thrifts did not receive cash in return for taking over the troubled thrifts. Instead, they received what is known as

"supervisory goodwill" from the Federal Government. They were told that they would be able to carry this goodwill on their books as capital for substantial periods of time. The savings and loans that entered into these arrangements have documentary evidence that they were encouraged by the federal banking regulatory agencies to enter into these transactions. The courts could well construe these agreements as formal contracts.

Now, some six or seven years later, Congress is telling these same thrifts that they cannot count this goodwill toward meeting the new capital standards. See: Section 314 of H.R. 1278. Many of these institutions are the financially healthy portion of this industry—making profits and paying dividends. Overnight, as the accounting standards are re-legislated, they will become "unsafe and unsound" for the purposes of federal banking law. Estimates are that if the new capital standards go into effect, as they are now contained in the House bill, at least 152 savings associations will automatically become insolvent on paper. A constitutional question is raised as to whether this statutory change in the treatment of supervisory goodwill might constitute a Fifth Amendment "taking" of private property without due process of law.

When the Committee on the Judiciary considered this legislation on May 24, I offered an amendment to respond to the unique situation faced by these institutions. My amendment was defeated by the narrowest of margins—a 17-17 tie vote, with one Member voting "present". My proposal is that the banking regulators (the FDIC and the Director of the Office of Thrift Supervision) should consider the special claims of this limited class of thrifts through the forum of a due process administrative hearing. This hearing would take place before any enforcement action is taken. Only those institutions that would meet the new capital standards requirements *but for* the statutory change in the treatment of their supervisory goodwill would be eligible to plead their case.

The hearing procedures would be fully consistent with the due process requirements of the Administrative Procedure Act (5 U.S.C. 551-559)—i.e., notice to interested parties and proceedings on the record. The amendment would not dictate or presuppose a particular outcome in any case. The "appropriate federal banking agencies" would have the discretion to determine whether or not a particular thrift had a valid, pre-existing contract with the United States with regard to the on-going treatment of their supervisory goodwill. In addition, the regulators could consider whether or not these savings associations have a potential claim under the Constitution (i.e., a taking of property without due process of law). If the regulators conclude there is either a valid contractual argument or a valid constitutional argument, then a remedial order could be issued. The regulators would have the flexibility to allow an individual thrift to include some or all of its supervisory goodwill as a means of meeting the new capital standards requirements on an interim or long-term basis.

Again, I want to emphasize that my amendment is not intended to pre-determine a particular outcome in these cases. Rather, it allows a limited class of claimants to seek an administrative remedy to a serious problem on a case-by-case basis. If these institutions have relied to their detriment on the representations made

by the Federal Government, they ought to at least have an opportunity to prove their case. Congress is rightly concerned about the financial state of the thrift industry. But the current terms of H.R. 1278 could end up punishing the very institutions that came to the aid of the taxpayers in the early part of this decade.

Given these facts, the change in regulatory treatment proposed in H.R. 1278 would certainly give these thrifts strong arguments in any subsequent litigation. Moreover, the language of the current legislation could also prompt the argument that the government has taken private property without just compensation.

Whatever the ultimate outcome of these contract and constitutional claims may be, there is little question in my mind that litigation is inevitable unless appropriate amendments to H.R. 1278, addressing these claims, are adopted. This litigation should not occur; if the Federal Government entered into actual agreements, then we should live up to our obligations.

Opponents of my amendment say due process is not appropriate in this instance because of the urgency of the FSLIC crisis. But even the opponents of my position admit that the institutions that received the supervisory goodwill did not cause the FSLIC crisis.

It is always easier not to provide due process of law. Due process, it is true, is not "convenient". But expediency is not the rule under our system. I believe that many of these institutions have a case based in law, in equity, and in fundamental fairness. If we do not at least provide these institutions with their basic procedural rights, it will demean both the law and the lawmakers.

HENRY J. HYDE, M.C.

